

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DANIEL SCHOLER,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 12-cv-5567-JRC

ORDER ON PLAINTIFF'S
CONTESTED MOTION FOR
ATTORNEY'S FEES PURSUANT
TO THE EQUAL ACCESS TO
JUSTICE ACT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, ECF No. 5; Consent to Proceed Before a United States Magistrate Judge, ECF No. 6). This matter comes before the Court on plaintiff's contested motion for attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 (hereinafter "EAJA") (*see* ECF Nos. 26, 27).

Subsequent to plaintiff's success at obtaining a reversal of the decision of the Social Security Administration, defendant Acting Commissioner challenged plaintiff's

1 request for statutory attorney's fees on the grounds that defendant's position in this
2 matter was justified in substance and had a reasonable basis in fact and law.

3 Because this Court disagrees, and because the requested fees are reasonable,
4 plaintiff's motion for statutory fees should be granted.

5 BACKGROUND and PROCEDURAL HISTORY

6 Plaintiff filed an application for disability insurance ("DIB") benefits pursuant to
7 42 U.S.C. § 423 (Title II) and Supplemental Security Income ("SSI") benefits pursuant to
8 42 U.S.C. § 1382(a) (Title XVI) of the Social Security Act (*see* Tr. 690). His applications
9 were denied initially and following reconsideration (Tr. 51). Plaintiff's requested hearing
10 was held before Administrative Law Judge Verrell Dethloff ("the ALJ") on August 2,
11 2007 (Tr. 704-31). On November 16, 2007, the ALJ issued a written decision in which he
12 concluded that plaintiff was not disabled pursuant to the Social Security Act (Tr. 11-23).

13 On March 26, 2008, the Appeals Council denied plaintiff's request for review,
14 making the written decision by the ALJ the final agency decision subject to judicial
15 review (Tr. 7-10). *See* 20 C.F.R. § 404.981. Plaintiff filed a complaint in this Court
16 seeking judicial review of the ALJ's written decision (*see* 08-cv-05299 RJB-KLS). A
17 stipulated Order for Remand was entered on October 15, 2008, remanding the matter
18 back to the Social Security Administration (Tr. 777-781).

19 On January 8, 2009, the Appeals Council issued an order to vacate the previous
20 decision and remanded for further proceedings consistent with the order of the District
21 Court (Tr. 782-786). The ALJ was directed to give further consideration to treating
22 source opinions, specifically those of Mary C. Mangione-Lambie, Ph.D., and William J.
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1 Morris, M.D., and to explain the weight given to them; to give further consideration to
2 plaintiff's maximum residual functional capacity; to re-evaluate plaintiff's ability to
3 return to his past relevant work; and if warranted, obtain supplemental evidence from a
4 vocational expert (Tr. 785).

5 ALJ Verrell Dethloff ("the ALJ") held hearings on June 23, 2009 (Tr. 1194-233),
6 April 6, 2010 (Tr. 1234-62) and June 4, 2010 (Tr. 1263-85). The ALJ issued his decision
7 finding plaintiff not disabled on August 10, 2010. The Appeals Council found no reason
8 to assume jurisdiction, making the ALJ's last written decision the Commissioner's final
9 decision subject to this Court's review (Tr. 732-35).

10 Plaintiff filed a complaint in this Court in July, 2012 (*see* ECF No. 1). Defendant
11 filed the sealed administrative record regarding this matter ("Tr.") on November 16, 2012
12 (*see* ECF Nos. 15, 17).

13 Following oral argument, this Court found that the ALJ failed to follow the Order
14 of the Court on remand to re-evaluate the medical evidence, including the opinion
15 evidence of Dr. Mary C. Mangione-Lambie, Ph.D., examining psychologist (*see* ECF No.
16 24, pp. 5-10). This matter was reversed pursuant to sentence four of 42 U.S.C. § 405(g)
17 for further consideration due to the harmful error in the evaluation of Dr. Mangione-
18 Lambie's opinion (*see id.*, pp. 18-19).

19 Subsequently, plaintiff filed a motion for EAJA attorney's fees, to which
20 defendant objected (*see* ECF Nos. 26, 27). Defendant "asserts that her position was
21 substantially justified and that no attorney fees should be awarded under the EAJA" (ECF
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1 No. 27, p. 2; *see also* pp. 2-7). Plaintiff did not file a reply, however addressed this issue
2 in his EAJA motion.

3 STANDARD OF REVIEW

4 In any action brought by or against the United States, the EAJA requires that "a
5 court shall award to a prevailing party other than the United States fees and other
6 expenses . . . unless the court finds that the position of the United States was
7 substantially justified or that special circumstances make an award unjust." 28 U.S.C. §
8 2412(d)(1)(A).

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10 According to the United States Supreme Court, "the fee applicant bears the burden
11 of establishing entitlement to an award and documenting the appropriate hours
12 expended." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The government has the
13 burden of proving that its positions overall were substantially justified. *Hardisty v.*
14 *Astrue*, 592 F.3d 1072, 1076 n.2 (9th Cir. 2010), *cert. denied*, 179 L.Ed.2d 1215, 2011
15 U.S. LEXIS 3726 (U.S. 2011) (*citing Flores v. Shalala*, 49 F.3d 562, 569-70 (9th Cir.
16 1995)). Further, if the government disputes the reasonableness of the fee, then it also
17 "has a burden of rebuttal that requires submission of evidence to the district court
18 challenging the accuracy and reasonableness of the hours charged or the facts asserted by
19 the prevailing party in its submitted affidavits." *Gates v. Deukmejian*, 987 F.2d 1392,
20 1397-98 (9th Cir. 1992) (citations omitted). The Court has an independent duty to review
21 the submitted itemized log of hours to determine the reasonableness of hours requested in
22 each case. *See Hensley, supra*, 461 U.S. at 433, 436-37.

DISCUSSION

In this matter, plaintiff clearly was the prevailing party because he received a remand of the matter to the administration for further consideration (*see* Order on Complaint, ECF No. 24, pp. 18-19). In order to award a prevailing plaintiff attorney fees, the EAJA also requires a finding that the position of the United States was not substantially justified. 28 U.S.C. § 2412(d)(1)(B).

Defendant correctly notes that the fact that the Administration did not prevail on the merits does not compel the conclusion that its position was not substantially justified (*see* Response, ECF No. 27, p. 3 (*citing Kali v. Bowen*, 854 F.2d 329, 334 (9th Cir. 1988))).

The Supreme Court squarely addressed the meaning of the term “substantially justified.” *See Pierce v. Underwood*, 487 U.S. 552, 564-68 (1988). The Court concluded that “as between the two commonly used connotations of the word “substantially,” the one most naturally conveyed by the phrase before us here is not “justified to a high degree,” but rather “justified in substance or in the main” -- that is, justified to a degree that could satisfy a reasonable person.” *Id.* at 565. The Court continued, noting that the stated definition “is no different from the ‘reasonable basis both in law and fact’ formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue.” *Id.* (citations omitted).

In addition, as stated by the Ninth Circuit, a “substantially justified position must have a reasonable basis both in law and fact.” *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258 (9th Cir. 2001) (*citing Pierce v. Underwood*, *supra*, 487 U.S. at 565; *Flores v. Shalala*,

1 49 F.3d 562, 569 (9th Cir. 1995)). The Court is to focus on whether or not the
2 Administration was substantially justified in taking its original action; and, in defending
3 the validity of the action in court. *Id.* at 1259 (*citing Kali, supra*, 854 F.2d at 332).

4 Although defendant discusses again arguments regarding the merits of the
5 underlying matter, the Court concludes that defendant has not demonstrated that the
6 reason for the reversal of this case concerned an issue with respect to which reasonable
7 minds could differ (*see* Response, ECF No. 27, p. 3 (*citing Gonzales v. Free Speech*
8 *Coalition*, 408 F.3d 613, 617 (9th Cir. 2005); *see also* ECF No. 27, pp. 3-6). Therefore,
9 the Court will address whether or not defendant was substantially justified in taking its
10 original action; and, in defending the validity of the action in court. *Guiterrez, supra*, 274
11 F.3d at 1259 (*citing Kali, supra*, 854 F.2d at 332); and, if the “substantially justified
12 position [] ha[s] a reasonable basis both in law and fact.” *See Guiterrez, supra*, 274 F.3d
13 at 1258 (citations omitted).

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15 Here, the Court refers to plaintiff’s summary of this Court’s Order on his
16 complaint:

17 First, this case had previously been remanded with orders to reconsider the
18 opinion of Dr. Mangione-Lambie. Despite this mandate from the Court, the ALJ
19 offered no discussion of Dr. Mangione-Lambie’s opinion in his decision. This
20 Court found that the “ALJ did not provide any specific analysis of Dr. Mangione-
21 Lambie’s conclusions, but rather relied on Dr. Lewy’s explanation regarding why
22 he rejected those opinions” [internal citation to ECF No. 24 at 7]. The Court also
23 noted that “[a] passing reference to Dr. Mangione-Lambie’s opinion, in
24 conjunction with a discussion of other DSHS evaluators by another reviewing
physician does not provide an explanation by this ALJ for rejecting her
conclusions, nor does it ‘explain the weight given to such opinion evidence’”
[internal citation to ECF No. 24 at 8 (*citing* Tr. 785)]. This Court found that it was
the ALJ’s responsibility, not the responsibility of a reviewing consultant, to
accept, reject and resolve conflicts in the medical opinions [internal citation to
ECF No. 24 at 8].

1 (see EAJA Motion, ECF No. 26, p. 6-7).

2 Even if the Court was to find persuasive defendant's argument that the ALJ
3 reasonably relied on Dr. Lewy's analysis of Dr. Mangione-Lambie's opinion and also
4 was to find that Dr. Lewy's analysis of her opinion was proper, there still lacks a
5 reasonable basis in law for the ALJ's failure to follow the Order from the Appeals
6 Council, as well as this Court's Order. The ALJ was directed to give further consideration
7 to treating source opinions, specifically including that of Dr. Mangione-Lambie, Ph.D.,
8 and to explain the weight given (see Tr. 785). Although arguably there is a reasonable
9 basis in fact for the ALJ's failure to do so, there is no reasonable basis in law for the
10 ALJ's failure to follow the direction to discuss the medical opinion of Dr. Mangione-
11 Lambie and explain the weight given.
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13 Furthermore, the Court finds persuasive the following argument of plaintiff:

14 Defendant's choice to defend these [ALJ] errors, particularly where the
15 ALJ failed to following the instructions of the Court requiring express
16 consideration of a specific opinion, did not have a reasonable basis in
17 law and fact and was not substantially justified.

18 (See ECF No. 26, p.8 (citing *Corbin v. Apfel*, 149 F.3d 1051, 1052 (9th Cir. 1998) (other
19 citation omitted)).

20 The Court concludes that there is no reasonable basis in fact or law for defending
21 before this Court the ALJ's failure to follow instructions of the Court and failure to
22 discuss the relevant examining psychologist's opinion: This is not a matter about which
23 reasonable minds could differ.
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1 The Court concludes that with respect to the ALJ's decision and the
2 Administration's defense of said decision before this Court regarding the conclusive issue
3 herein, the Administration's position was not substantially justified.

4 The Court also concludes that there are no special circumstances which render an
5 EAJA award in this matter unjust.

6 Therefore, all that remains is to determine the amount of a reasonable fee. *See* 28
7 U.S.C. § 2412(b); *Hensley, supra*, 461 U.S. at 433, 436-37; *see also Roberts v. Astrue*,
8 2011 U.S. Dist. LEXIS 80907 (W.D. Wash. 2011), *adopted by* 2011 U.S. Dist. LEXIS
9 80913 (W.D. Wash. 2011).

10 Once the court determines that a plaintiff is entitled to a reasonable fee, "the
11 amount of the fee, of course, must be determined on the facts of each case." *Hensley*,
12 *supra*, 461 U.S. at 429, 433 n.7. According to the U.S. Supreme Court, "the most useful
13 starting point for determining the amount of a reasonable fee is the number of hours
14 reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*,
15 *supra*, 461 U.S. at 433.

16 Here, plaintiff prevailed on the single claim of whether or not the denial of his
17 social security application was based on substantial evidence in the record as a whole and
18 not based on harmful legal error. When the case involves a "common core of facts or will
19 be based on related legal theories the district court should focus on the
20 significance of the overall relief obtained by the plaintiff in relation to the hours
21 reasonably expended on the litigation." *See Hensley, supra*, 461 U.S. at 435. The
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1 Supreme Court concluded that where a plaintiff “has obtained excellent results, his
2 attorney should recover a fully compensatory fee.” *Id.*

3 The Court concludes based on a review of the relevant evidence that the plaintiff
4 here obtained excellent results. Therefore, the Court will look to “the hours reasonably
5 expended on the litigation,” which, when combined with the reasonable hourly rate,
6 encompasses the lodestar. *See Hensley, supra*, 461 U.S. at 435. Other relevant factors
7 identified in *Johnson, supra*, 488 F.2d at 717-19 “usually are subsumed within the initial
8 calculation of hours reasonably expended at a reasonable hourly rate.”¹ *See Hensley,*
9 *supra*, 461 U.S. at 434 n.9 (other citation omitted); *see also Kerr v. Screen Extras Guild,*
10 *Inc.*, 526 F.2d 67, 70 (9th Cir. 1975) (adopting *Johnson* factors); *Stevens v. Safeway,*
11 2008 U.S. Dist. LEXIS 17119 at *40-*41 (C.D. Cal. 2008) (“A court employing th[e
12 *Hensley* lodestar method of the hours reasonably expended multiplied by a reasonable
13 hourly rate] to determine the amount of an attorney’s fees award does not directly
14 consider the multi-factor test developed in *Johnson, supra*, 488 F.2d at 717-19, and *Kerr,*
15 *supra*, 526 F.2d at 69-70”); *but see Goodwin v. Astrue*, 2012 U.S. Dist. LEXIS 97651 at
16 *10-*12, *14-*20 (W.D. Wash. 2012) (applying *Johnson* factors), *adopted by* 2012 U.S.
17 Dist. LEXIS 97650 (W.D. Wash. 2012). These guidelines are consistent with Washington
18 Rules of Professional Conduct 1.5.
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21 ¹ The *Johnson* factors are: (1) The time and labor involved; (2) the novelty and difficulty of the questions involved; (3)
22 the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance
23 of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the
24 circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10);
the ‘undesirability’ of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in
similar cases. *Johnson, supra*, 488 F.2d at 717-19) (citations omitted); *see also United States v. Guerette*, 2011 U.S. Dist. LEXIS
21457 at *4-*5 (D. Hi 2011) (“factors one through five have been subsumed” in the determination of a number of hours
reasonably expended multiplied by a reasonable rate); *but see City of Burlington v. Dague*, 505 U.S. 557 (1992) (rejecting factor
6 of contingent nature of the fee).

1 Given the facts and circumstances of the matter herein, and based on the briefing,
 2 declarations and attorney time sheet, the Court concludes that the amount of time
 3 incurred by plaintiff's attorney in this matter is reasonable.

4 Specifically, following a review of plaintiff's request, the Court finds reasonable
 5 plaintiff's request for expenses in the amount of \$20.30 and for attorney's fees in the
 6 amount of \$7,768.05, representing 41.9 hours of work, for a total award of \$7,788.35.

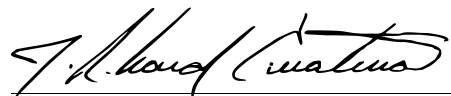
7 CONCLUSION

8 Plaintiff's request for \$20.30 in expenses should be granted.

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 10 Plaintiff should be awarded \$7,768.05 in attorney's fees, representing 41.9 hours
 11 of work, for a total award of \$7,788.35, pursuant to the EAJA and consistent with *Astrue*
 12 *v. Ratliff*, 130 S. Ct. 2521, 2524, 2010 U.S. LEXIS 4763 at ***6-***7 (2010).

13 Plaintiff's award is subject to any offset allowed pursuant to the Department of
 14 Treasury's Offset Program. *See id.* at 2528. If it is determined that plaintiff's EAJA fees
 15 are not subject to any offset, or if there is a remainder after an offset, the check for EAJA
 16 fees shall be made payable to plaintiff's counsel, either by direct deposit or by check
 17 payable to Dellert Baird Law Offices, PLLC, based on plaintiff's assignment of these
 18 amounts to plaintiff's attorney. The checks for EAJA fees and costs shall be mailed to
 19 plaintiff's counsel at Dellert Baird Law Offices, PLLC, 9481 Bayshore Dr. NW, #203,
 20 Silverdale, WA, 98383.

21 Dated this 10th day of March, 2014.

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24 J. Richard Creatura
 United States Magistrate Judge